SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1952~~ 1953

No. ~~823~~ 87

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, RICHARD E. MITTELSTAEDT, JUSTUS F. CRAEMER, ET AL.,

Appellants,

vs.

UNITED AIR LINES, INC., CATALINA AIR TRANSPORT AND CIVIL AERONAUTICS BOARD

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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STATUTES CITED

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Case No. 31638

UNITED AIR LINES, INC., A CORPORATION; AND CATALINA AIR TRANSPORT, A CORPORATION,
Plaintiffs-Appellees

CIVIL AERONAUTICS BOARD,
Intervenor

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, RICHARD E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER, AND PETER E. MITCHELL, MEMBERS OF AND COLLECTIVELY CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; EVERETT C. McKEAGE, WILSON E. CLINE, RODERICK B. CASSIDY, AND J. THOMASON PHELPS, LEGAL ADVISERS OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Defendants-Appellants

STATEMENT IN OPPOSITION TO APPELLANTS' STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

United Air Lines, Inc., a corporation, and Catalina Air Transport, a corporation, Appellees, present this joint

statement in opposition to Appellants' Statement as to Jurisdiction herein, and move that the within appeal be dismissed or that the judgment of the District Court be affirmed. In support of their motion to dismiss or affirm, Appellees respectfully show the following:

I. Statement of Issues on Appeal

On October 13, 1939 the Civil Aeronautics Authority, now known as the Civil Aeronautics Board, issued a certificate of public convenience and necessity to Wilmington-Catalina Airlines, Ltd., the predecessor of Appellee Catalina Air Transport, authorizing the air transportation of persons and property between Wilmington, on the mainland of California, and Avalon, on Santa Catalina Island. Santa Catalina Island is located in the Pacific Ocean, and is a part of the State of California. The distance between the shorelines of the Island and of the mainland of California is 30 miles.

The award of the certificate to Wilmington-Catalina Airlines, Ltd., was based upon findings that the boundaries of California did not extend beyond a distance of 3 miles from the shoreline of the mainland, and beyond a distance of 3 miles from the shoreline of Santa Catalina Island. Since aircraft flying between Wilmington and Avalon were required to fly over approximately 24 miles of water not within the boundaries of the State of California, the Board concluded that common carrier transportation by aircraft between these points constituted interstate air transportation, as defined by the Civil Aeronautics Act. *Wilmington-Catalina Air, Grandfather Certificate,* 1 C. A. A. 431.

The Civil Aeronautics Act defines "interstate air transportation" to include, among other things, "the carriage by aircraft of persons or property as a common carrier for compensation or hire * * * in commerce between * * *

places in the same State of the United States through the air space over any place outside thereof . . .", 49 U. S. C. 401 (21)(a).

On July 22, 1941, the Civil Aeronautics Board extended the route of Wilmington-Catalina Airlines, Ltd. to Los Angeles, authorizing the carrier to conduct operations between Los Angeles and Avalon via the intermediate point of Wilmington. At the same time the Board reissued the certificate in its entirety to reflect the change of the carrier's name from Wilmington-Catalina Airlines, Ltd. to Catalina Air Transport. *Catalina Air, Service to Santa Catalina Island,* 2 C. A. B. 798. This amended certificate has ever since continued in full force and effect.

Operations were conducted continuously by Wilmington-Catalina Airlines, Ltd. and by Catalina Air Transport over these routes in accordance with the certificates of public convenience and necessity issued by the Civil Aeronautics Board from October 13, 1939 until the carriers' equipment was requisitioned by the United States Government for military purposes in 1942. Following this requisition, the Board authorized a temporary suspension of operations which continued for the duration of World War II. See 6 C. A. B. 1041, 1043 (1946).

During all periods of operation by Wilmington-Catalina Airlines, Ltd. and its successor, Catalina Air Transport, tariffs for the carriage of persons and property were maintained on file with the Civil Aeronautics Board and operations were conducted under the regulatory control of the Civil Aeronautics Board. Tariffs were at no time filed with the Appellant Public Utilities Commission of California.

On June 3, 1946, the Civil Aeronautics Board approved an operating contract between Appellee United Air Lines, Inc. and Catalina Air Transport, dated March 7, 1946, under which United agreed to perform and discharge all of

the obligations of Catalina Air Transport under its certificate of public convenience and necessity. *United Air Lines, Operation of Catalina Air Transport,* 6 C. A. B. 1041. Various supplemental agreements relating to the rates and fares to be charged to the public for the transportation provided by United were filed with, and subsequently approved by, the Board, together with various other agreements relating to miscellaneous details of the operation. This operating contract, and the approval thereof by the Board, has been continuously in effect since June 3, 1946, and operations have been and are being conducted by United thereunder. Tariffs for the carriage of persons and property have been, and are, maintained on file by United with the Civil Aeronautics Board, and operations have been, and are being, otherwise conducted by United under the exclusive regulatory control and jurisdiction of the Civil Aeronautics Board.

During the entire period of operation of the route described above, the exclusive jurisdiction of the Civil Aeronautics Board remained unchallenged. However, on September 20, 1951, the Public Utilities Commission of California notified Appellee United by letter that it claimed jurisdiction over the route "it being intrastate" and went on to say:

> "Therefore, you are instructed to file with this Commission the tariffs covering the service in question."

On December 27, 1951 the Commission again "instructed" United by letter "to file with this Commission the tariffs covering the service between Avalon and Long Beach-Los Angeles." Faced with conflicting claims of jurisdiction over its route by State and Federal agencies and with the prospect of incurring penalties up to $2,000 for each day that its tariffs were not on file with the Public Utilities Commission, Appellees brought this action in the United States

District Court for the Northern District of California, seeking to restrain the Commission from bringing any proceeding for the recovery of penalties alleged to be due under the laws of California by reason of Appellees' failure to file tariffs with the Commission covering such route on the ground that such penalties were unconstitutional under the Fourteenth Amendment of the Federal Constitution. In addition, Appellees sought a declaratory judgment that exclusive jurisdiction over the operation of the route was vested in the Civil Aeronautics Board under the Civil Aeronautics Act and that the Public Utilities Commission of California had no authority to compel Appellees to file its tariffs with the Commission. A three-judge court was convened, pursuant to 28 U.S.C. Secs. 2281, 2284. The Civil Aeronautics Board intervened as a plaintiff in the case, taking the position that its jurisdiction over the operations was exclusive under the terms of the Civil Aeronautics Act. The court unanimously decided the case in favor of the Appellees, ruling that the Civil Aeronautics Board has exclusive jurisdiction over the operations involved, that Appellants have no jurisdiction over these operations, and restraining Appellants from interfering with the paramount jurisdiction of the Civil Aeronautics Board. The case is now in this Court on direct appeal, pursuant to 28 U.S.C. Sec. 1253.

There are two main issues presented at this juncture of the case. The first arises from Appellants' contention that Federal jurisdiction is lacking over the proceeding, and the second presents the question whether, by the provisions of the Civil Aeronautics Act and the actions of the Board thereunder, the United States has assumed exclusive jurisdiction to regulate operations over the subject route.

II. The Court Below Had and Properly Exercised Jurisdiction in This Case

A. *The Jurisdiction of the Three-Judge Court*

28 U.S.C. Sec. 2281 provides that a three-judge court must be convened in an action to secure an

> "interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes . . . upon the ground of the unconstitutionality of such statute. . . ."

In this case Appellees challenged the constitutionality of Sec. 2107 of the California Public Utilities Code which subjects a public utility (as defined in such Code) to penalties up to $2,000 per day for failure to comply with "any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the Commission . . ." Consequently, a three-judge court was properly convened to hear and determine the cause. After hearing, the court in its opinion remarked that:

> "The Supreme Court has made the frequent admonition that federal courts should refrain from invalidating statutes on the constitutional grounds when there are other adequate grounds for decision (citing cases)."

and then went on to state, at 109 F. Supp. 15:

> "We do not reach nor decide the issue tendered, that the state statute is unconstitutional. If the cause required the resolution of no other *federal issue*, obviously this court could dissolve itself. See Bowles v. Case, 9 Cir. 149 Fed. 2d 777; affirmed 327 U.S. 92; Ex parte Bransford, 310 U.S. 354; cf. Farmers Gin Co. v. Hayes, 54 Fed. Supp. 43.

"But there are other adequate bases of federal jurisdiction. 28 USC §§ 1331, 1337; 28 USC § 2201. Such being the case, this Court, having properly acquired jurisdiction, has power to consider and dispose of all questions involved in the suit. Louisville & Nashville Railroad Co. v. Garrett, 231 U.S. 298; Fireman's Ins. Co. v. Beha D. C. 30 Fed. 2d 539; Fisher v. Brucker D.C. 41 Fed. 2d 774."

The court then proceeded to the questions whether Congress had pre-empted the field of regulation of interstate air transportation when it enacted the Civil Aeronautics Act, and whether the operation of the California-Catalina route constituted "interstate air transportation" within the meaning of the Act.

Appellees maintain that the action of the court below was correct because the jurisdiction of a three-judge court existing by reason of the presence of a substantial constitutional question "extends to every question of law involved, whether of state or federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case." *Sterling* v. *Constantin*, 287 U.S. 378, 393-394 (1932); *California Water Service Co.* v. *Redding*, 304 U.S. 252, 255-256 (1938). "A District Court composed of three judges under §266 of course has jurisdiction to determine every question involved in the litigation pertaining to the prayer for an injunction, in order that a single lawsuit may afford final and authoritative decision of the controversy between the parties." *Public Service Commission of Missouri et al.* v. *Brashear Freight Lines, Inc. et al.*, 312 U.S. 621, 625 (1941). See also *Railroad Commission* v. *Pacific Gas & Electric Co.*, 302 U.S. 388, 391 (1938). Having already heard argument, the court was familiar with all aspects of the case and was accordingly in a position to render a final and authoritative decision of the controversy. If the court were to have dissolved itself,

as Appellants now contend it should, the effect would have been to prolong the litigation, increase the burdens and expenses of the parties, and leave a cloud over the jurisdiction long exercised by the Civil Aeronautics Board over an important segment of air transportation. Appellees submit that the court below acted properly, in the interests of sound judicial administration, in retaining jurisdiction and in promptly and expeditiously reaching a decision.[1]

B. *Jurisdiction of the District Court*

As we understand Appellants' contentions, their position is not only that three-judge court jurisdiction was lacking under 28 U.S.C. Sec. 2281, but that there was no basis of Federal substantive jurisdiction, even in a one-judge District Court. In making this argument, Appellants contend that Appellees failed to exhaust their State administrative remedies and that Appellees failed to establish irreparable injury entitling them to injunctive relief. We submit that Appellants' contentions with respect to Federal substantive jurisdiction are wholly lacking in merit.

Secs. 1331 and 1337 of Title 28, United States Code, provide:

Sec. 1331:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest

[1] If this Court should decide that the three-judge court was improperly convened, or that even though properly convened, the three-judge court should have dissolved itself after deciding that it was unnecessary to decide the constitutional question, the judgment below is nevertheless "the final order of the district court. . . ." *Stainback* v. *Mo Hock Ke Loh Po*, 336 U.S. 368, 381 (1949). The only effect of such a decision would be to eliminate the jurisdictional basis under 28 U.S.C. Sec. 1253 for a direct appeal to this Court. *Gully* v. *Interstate Nat. Gas Co.*, 292 U.S. 16, 19 (1933); *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U.S. 386, 392 (1933).

and costs, and arises under the Constitution, laws or treaties of the United States."

Sec. 1337:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

In view of these provisions there can be no question that proper Federal jurisdiction exists in this case involving, as it does, claims arising under the Federal Constitution and Federal statutes. Appellants' arguments, therefore, are really directed against the exercise, rather than the existence, of Federal jurisdiction. The precise issue is whether the court below, as a matter of sound judicial discretion, should have exercised its jurisdiction. Certainly, the ordinary procedure for a Federal court is to decide Federal questions presented to it. There are certain exceptions which motivate Federal courts to decline jurisdiction to strike down State legislation, but these exceptions for the most part concern situations in which difficult constitutional questions might be avoided by an interpretation of State law by the State courts in the first instance, or where State regulatory orders involving clearly intrastate operations primarily of local concern are involved. *Propper* v. *Clark*, 337 U. S. 472 (1949); *Alabama Public Service Commission* v. *Southern Ry. Co.*, 341 U. S. 341 (1951).

We submit that no exceptional circumstances exist in this case to deter a Federal court from exercising its power of decision. On the contrary, we contend that the case is one especially suited for determination in the Federal courts. Federal courts are uniquely equipped to decide national issues involving the construction of a *Federal* statute, and its application to interstate commerce. We re-

iterate that one issue in the case, indeed, the very issue which the court below regarded as decisive, concerned the interpretation of an Act of Congress vesting exclusive jurisdiction in a Federal regulatory agency. Such a claim is well within the province of Federal jurisdiction; it is a claim which the Federal courts should be constantly alert to evaluate and protect. *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218 (1947); *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148 (1942); *Mayo* v. *United States*, 319 U. S. 441 (1943); *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605 (1926); *Hines* v. *Davidowitz*, 312 U. S. 52 (1941).

To hold otherwise would reflect overweening deference to State authority, especially in situations like the present where Federal regulation has gone unchallenged by the State of California for so long a period. The route in question has been subject, without attack, to exclusive Federal jurisdiction for almost thirteen years. To argue that the direction by the California Commission to file tariffs with it requires the Appellees to submit to the Commission's asserted jurisdiction and pursue only such remedies as the State law gives it—and these are niggardly, as we shall later point out—is to reduce the previously unchallenged authority of the Civil Aeronautics Board to an almost servile status. Under Appellants' contentions, Federal agencies such as the Civil Aeronautics Board would be required to go to the California Commission and California courts to vindicate their authority under Federal law over interstate air transportation whenever the State agency saw fit to challenge it. This amounts to much more than a "scrupulous regard . . . for the rightful independence of State governments which should at all times actuate the federal courts . . ." *Matthews* v. *Rodgers*, 284 U. S. 521, 525 (1932). This would be an abdication of responsibility by the Federal courts to pass upon the merits of a claim as to

invalidity of State legislation when the claim is based upon a conflict between such State legislation and Federal legislation.

Appellants argue, nevertheless, that Appellees are not entitled to Federal jurisdiction because of their failure to exhaust their State administrative remedies. This argument is advanced despite the absence of any indication by the Commission prior to the trial of the case that it did not consider its letters to Appellees as final administrative orders and determinations. We direct the court's attention to the specific language in the Commission's letters. The Commission's December 27, 1951 letter stated, in part:

> "In view of our interpretation of the Civil Aeronautics Act and the California Constitution we again instruct . . . United Air Lines, Inc. to file with this Commission the tariffs covering the service between Avalon and Long Beach-Los Angeles."

Indeed, in the Statement as to Jurisdiction filed by Appellants in this court (p. 19), Appellants state that the Commission's letters "*were sent after considering the contentions of plaintiff United . . .*" In view of these repeated orders directing Appellants to file their tariffs with the Commission, there was nothing present in the situation to indicate that the Commission desired, or would permit, further administrative action before Appellants filed their tariffs with the Commission. Fairly read, these instructions from the Commission are not susceptible of the interpretation, now urged by the Commission, that they were in nowise compulsive but only a preliminary warning of an impending investigation of United's operations.

In this connection, Judge Orr said in the hearing on the motion for preliminary injunction (p. 98):

> "* * * I know if I were in the position of the air lines and got a letter like that, I would commence to do

something. I think I would better do something right away, either send the tariffs or tell them the circumstances.

"That seems to me like an order, a direct order, and what may be back of it, I think I am logical in saying that that does not convey to the party—no matter what their intention may have been, that letter does not convey that impression to the person receiving it. It means that the party receiving it, you better comply with this, you do this thing—that's it. And I received it, I would feel I better do that or take some other action to challenge their jurisdiction or do something else, because otherwise I might get into very serious trouble."

Judge Murphy said at the same hearing (p. 107):

"This last letter of December 27, 1951 is a very well-thought-out letter. It contains a very concise analysis of the position taken by the Public Utilities Commission, and then it ends up with a final paragraph:

"'In view of our interpretation of the Civil Aeronautics Act and the California Constitution, we again instruct you,——'

after giving an analysis in some detail of the factual situation and the predicates upon which you base your conclusions.

"If that isn't notice I can't conceive of any more formal notice. 'We again instruct you.'"

As Judge Orr and Judge Murphy observed in the hearing below, Appellees were faced with an explicit direction to file their tariffs with the Commission. Under the circumstances, the suit was not prematurely instituted. Cf. *City Bank Farmers Trust Co.* v. *Schnader*, 291 U. S. 29, 34 (1934).

Furthermore, we call attention to the fact that under California law a person is entitled to a review of rate action of the Public Utilities Commission only in the Supreme

Court of California and then only on questions of confiscation. Constitution of California, Article XII, Section 20. The severely limited nature of this review renders it inadequate for the type of controversy here involved and furnishes further support for the holding below that the controversy was a proper one for determination by a Federal court.

Appellants maintain that Appellees have failed to sustain the burden of showing threatened and probable action which would cause irreparable injury. However, this contention completely overlooks the facts. Appellants in the past have caused proceedings to be instituted in the California courts for the recovery of penalties against various air carriers, including Appellee United, in other cases wherein disputes have existed concerning the regulatory jurisdiction of the Commission (Finding of Fact 12). This course of action demonstrates a strong possibility of probable similar action with respect to the Catalina controversy. Furthermore, Appellants readily concede that they have asserted and continue to assert jurisdiction over the Catalina operations and that they intend to require Appellees to appear and defend in a proceeding before the Commission, which in all likelihood will be only an empty formality in view of the statement of the Commission's Chief Counsel that "he will again advise the Commission in the proceeding which will be instituted by the Commission that the Commission has and should assert jurisdiction over the operations here involved . . ." (Finding of Fact 11). Cf. *City Bank Farmers Trust Co.* v. *Schnader*, 291 U. S. 24, 34 (1934). The District Court found as a fact that the cost of defending such proceeding will exceed $3,000, for which the Appellees will not be recompensed (Finding of Fact 11). In addition, Appellee United would have been subject to Federal penalties if it charged rates for the route involved different from

the rates already established in its tariffs on file with the Civil Aeronautics Board, 49 U. S. C. Sec. 622(d), and 49 U. S. C. Sec. 483. As the opinion of the court below stated:

> ". . . United thus found itself confronted with a sudden, belated and somewhat unexplained claim of jurisdiction. Being fearful of the consequences besetting a victim of conflicting jurisdictions, United filed this action."

Under the circumstances, Appellees maintain that the court below acted well within its discretion in awarding injunctive relief.

C. *This Court's Recent Decision in Public Service Commission of Utah v. Wycoff*

Appellants further rely upon the recent decision of this court in *Public Service Commission of Utah* v. *Wycoff*, 344 U. S. 237 (1952) to bolster their contention that the court below should not have exercised its jurisdiction over this case. *Wycoff* involved an action brought by a motor carrier in a Federal District Court seeking a purely abstract declaration that its carriage of goods between points within as well as without Utah was all interstate commerce. The carrier offered no evidence whatever to establish any past, pending or threatened action by the Public Service Commission of Utah touching its business in any respect. The trial court made a general finding that no such interference had been made or threatened. (344 U. S. at 240.)

In *Wycoff* this court held that the case could not be maintained as an injunctive action "because there is no proof of any threatened or probable act of the defendants which might cause the irreparable injury essential to equitable relief by injunction." (344 U. S. at p. 241.) Neither could the case be maintained as an action for declaratory judgment, because "the dispute has not matured to a point where

we can see what, if any, concrete controversy will develop." Nor was it apparent that the "proceeding would serve a useful purpose if at some future date the State [undertook] . . . regulation" of the carrier. (344 U. S. 245, 246.) However, *Wycoff* did not purport to limit the jurisdiction of the Federal courts to grant injunctive relief in cases where irreparable injury is established, or to lay down any tests for establishing irreparable injury different from those previously established by applicable case law. Neither did *Wycoff* hold, or remotely suggest, that whenever a State administrative body seeks to oust the jurisdiction of a Federal agency over a particular phase of commerce, a Federal court, even though its jurisdiction is properly invoked, must nevertheless stand meekly by until the State commission and State courts have had their say.

We submit that *Wycoff* is distinguishable from this case by at least the following factors:

1. In *Wycoff* there was no proof of any threatened or probable act which might cause irreparable injury. Here such proof was introduced in the record and the District Court specifically found as a fact that United's refusal

> "to heretofore comply with the directives of the defendant Commission to file tariffs, and any refusal to comply with any future such directive, has and will subject United to the risk of incurring the mentioned heavy penalties, or, if these penalties are not applicable to air carriers as United contends, to the risk of incurring substantial expenditures in defending against suits for the recovery of penalties. Apart from these risks, United is confronted with the necessity for incurring the expenditures incident to defending a proceeding certain to be instituted before the defendant Commission unless this Court resolves the controversy presented. No provisions exist under which United may recover its expenditures from the defendants, and these certain and possible expenditures may ultimately

be borne in whole or in part by the traveling public either in the form of increased transportation charges or less efficient service by United." (Finding of Fact 13)

2. In *Wycoff* the dispute had not matured to a point where the court could determine that any concrete controversy would develop. In this case there was a live and concrete controversy involving a precise question: whether United was obligated to file tariffs for the Catalina route with the Commission. The clash between the Commission on the one hand and the Civil Aeronautics Board and Appellees on the other hand is clear with respect to tariffs and control over the Catalina operations. There is no uncertainty as to the claims of either side, or as to the action which the Commission proposes. The merits of the problem here involved are not dependent upon a resolution of complicated facts within the particular competence of a regulatory body. Indeed, the facts are not disputed and the only question is a legal one: Does the Civil Aeronautics Act grant exclusive jurisdiction to the Civil Aeronautics Board to regulate rates charged by United over its Catalina route?

3. In *Wycoff* the declaratory decree sought would not have ended the controversy, and further proceedings would have been required when the Commission undertook to impose specific regulatory requirements. (344 U. S. at p. 246.) There would then be need for evidence concerning the facts then existing (344 U. S. at p. 247) and the evaluation of that evidence relating to operations unquestionably intrastate, which could best be determined in the first instance by an expert agency. Here the declaratory decree would finally settle the controversy. Furthermore, the question can be determined once and for all in the Federal court. In *Wycoff* there was no claim by the Federal regulatory agency concerned of any infringement of its jurisdiction. Here, the Civil Aeronautics Board intervened and became a party

to the suit, contending vigorously that Congress had vested it with exclusive jurisdiction over the subject route. There is nothing "nebulous or contingent" about the controversy in this case. The disagreement has taken on "fixed and final shape," the court "can see what legal issues it is deciding, what effect its decision will have on the adversaries and [that] some useful purpose [will] be achieved in deciding them." (344 U. S. at 244.)

We believe this case to be controlled by cases such as *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218; *Bethlehem Steel Corp.* v. *N. Y. State Labor Relations Board*, 330 U. S. 767; *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456; and *Cloverleaf Co.* v. *Patterson*, 315 U. S. 169. These cases were not even cited in, much less overruled by, the *Utah* case. In the *United Fuel* case, for example, the court specifically adverted to the fact that the State Commission there involved "has not yet done more than assert its jurisdiction over United's rates" (317 U. S. at p. 465). It nevertheless upheld the granting of injunctive relief by the Federal court, stating (317 U. S. at pp. 468 and 469):

> "Since these orders are invalid insofar as they impinge upon an authority which Congress has now vested solely in the Federal Power Commission, the decree below must stand unless we can fairly conclude that it was an abuse of discretion for the District Court to grant relief by way of injunction. It is perhaps unnecessary at this late date to repeat the admonition that the federal courts should be wary of interrupting the proceedings of state administrative tribunals by use of the extraordinary writ of injunction. But this, too, is a rule of equity and not to be applied in blind disregard of fact. And what are the commanding circumstances of the present case? First, and most important, the orders of the state Commission are on their face plainly invalid. No inquiry be-

yond the orders themselves and the undisputed facts which underlie them is necessary in order to discover that they are in conflict with the federal Act. If, therefore, United complies with these orders, it will be put to the expenditures incident to ascertaining the base for rate-fixing purposes—expenses which may ultimately be borne by the consuming public and which Congress, by conferring exclusive jurisdiction upon the federal regulatory agency, necessarily intended to avoid. If United does not comply with the orders, it runs the risk of incurring heavy fines and penalties or, at the least, in provoking needless, wasteful litigation. In either event, enforcement of the Commission's orders would work injury not assessable in money damages, not only to the appellee but to the public interest which Congress deemed it wise to safeguard by enacting the Natural Gas Act. In these circumstances, we cannot set aside the decree of the District Court as an improper exercise of its equitable jurisdiction. *Petroleum Exploration* v. *Public Service Comm.*, 304 U. S. 209, 58 S. Ct. 834, 82 L. Ed. 1294, was a very different case. There the regulation of intrastate rates alone was involved, no conflict between federal and state authorities was in issue, and the appeal to equity sought to anticipate the appropriate exhaustion of the administrative process."

For these reasons, we submit:

(1) that the three-judge court had jurisdiction under 28 U. S. C. 2281 because Appellants challenged the constitutionality of a State statute;

(2) that the three-judge court, having jurisdiction, was empowered to decide all issues in the case;

(3) that under applicable principles of law the court below acted properly in exercising its jurisdiction.

III. The Civil Aeronautics Act Vests Exclusive Jurisdiction Over the California-Catalina Route in the Civil Aeronautics Board.

As discussed above, the Civil Aeronautics Act defines "interstate air transportation" to include, among other things, "the carriage by aircraft of persons or property as a common carrier for compensation or hire * * * in commerce between * * * places in the same State of the United States through the air space over any place outside thereof . . ." 49 U. S. C. 401(21)(a).

Appellants do not question the power of Congress to regulate interstate air transportation. Their argument is that the transportation here involved is not "interstate air transportation" within the meaning of the Civil Aeronautics Act. We submit that this argument cannot be supported.

It has long been established that transportation between places in the same State over the high seas or territorial waters outside the State constitutes foreign or interstate commerce subject to Federal control. *Lord* v. *Steamship Co.*, 102 U. S. 541 (1880). See also *Cornell Steamboat Co.* v. *United States*, 321 U. S. 634 (1944) and *Pacific Coast Steam-Ship Co.* v. *Board of Railroad Commissioners*, 18 Fed. 10 (C. C. Cal., 1883).

The legislative history of the pertinent sections of the Civil Aeronautics Act clearly establishes that Congress intended to regulate air transportation between places in the same State when that transportation involves the passage of aircraft over waters outside the State. This is made abundantly clear by the fact that one of the first bills introduced for the regulation of interstate air commerce (S. 3027, 74th Cong., 1st Sess., 1935), defined interstate commerce as "commerce * * * between places in the same state through another state." Upon the request of Senator

Wheeler, Mr. Joseph Eastman, Federal Co-ordinator of Transportation, suggested corrections in the bill. In a letter on July 31, 1935, Mr. Eastman suggested that "after the word 'through' in line 18 there be substituted for the words 'another state' the words 'the air space over any places outside thereof'. The latter change would include as interstate commerce transportation between points in the same state over a foreign country or the high seas, as well as over another state." Hearing before the Subcommittee on Interstate Commerce, United States Senate, 74th Cong., 1st Sess., S. 3027, page 68. Mr. Eastman's suggested change appears in all bills after the date of his letter, and is now contained in Sections 1(20) and 1(21) of the Act, 49 U. S. C. 401(20), 401(21).

Moreover, it is equally apparent that Congress sought to regulate air transportation of the type here involved in a complete and comprehensive manner. For example, the Civil Aeronautics Act provides that tariffs for interstate air transportation must be filed with the Board, 49 U. S. C. 483, that rates and charges contained therein may be fixed by the Board, 49 U. S. C. 642(d), and that tariffs filed and rates fixed must be observed or heavy penalties incurred, 49 U. S. C. 622(d). In addition, the Act empowers the Board to prescribe all practices in connection with such transportation, 49 U. S. C. 484, 491, 642, and further provides that operations may be suspended or terminated only by leave of the Board, 49 U. S. C. 481(k). Other examples of the comprehensive manner in which the Act regulates air transportation are found in provisions authorizing the Board to determine whether a particular carrier is rendering adequate interstate service, 49 U. S. C. 484, 642, in provisions directing carriers to file all contracts affecting interstate air transportation with the Board for approval or disapproval, 49 U. S. C. 488, 492, in provisions subjecting to Board control all intercorporate relationships, and in

provisions authorizing the Board to prescribe standards under which accounts and records must be maintained, 49 U. S. C. 487.

Mr. Justice Jackson's concurring opinion in *Northwest Airlines* v. *Minnesota*, 322 U. S. 292 (1944) at 303, well describes the extent of Federal regulation of air transportation:

> "Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government."

There can thus be no doubt that the Civil Aeronautics Act imposes complete and comprehensive regulation upon all phases of interstate air transportation. In clashes of *State* v. *Federal* regulatory control of this nature, this court enunciated the following test:

> "The test, therefore, is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act. If it is, the Federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, at 236 (1947).

Applying that test to these circumstances, California's claim to jurisdiction over the California-Catalina route must fall. "There is no room in our scheme of government for the assertion of State power in hostility to the author-

ized exercise of Federal power." *Simpson* v. *Shepard*, 230 U. S. 352, at 399 (1913). The contention of Appellants that California may regulate this route must give way by virtue of the Supremacy clause. U. S. Const. Art. VI, Cl. 2.

IV. The Air Space Through Which Appellees' Flights Traverse on the California-Catalina Route Are Over Waters Outside California, and Accordingly Constitute Interstate Air Transportation.

It is undisputed that Santa Catalina Island is separated from the mainland of California by the San Pedro Channel, and that the distance between the shorelines of the Island and the mainland of California is approximately 30 miles. Forty years ago, the Supreme Court of California found as a fact that surface transportation between the Island and the mainland requires "travel for upwards of 20 miles upon the high seas outside of the territorial jurisdiction of . . . [California]." *Wilmington Transportation Co.* v. *Railroad Commission of California*, 166 Cal. 741, 137 P. 1153 (1913). This decision was affirmed by the Supreme Court of the United States in *Wilmington Transportation Co.* v. *Railroad Commission of California*, 236 U. S. 151, 152 (1915). In its opinion in the *Wilmington* case, this court expressly stated that vessels traveling between the Island and the mainland "must traverse the high seas for upwards of 20 miles." Appellees contend that these decisions conclusively establish that the waters separating Santa Catalina Island from the California mainland are not inland waters of California.

We deem it significant that Appellants have not even commented on these statements in the *Wilmington* decisions in their Statement as to Jurisdiction. In view of these decisions, we respectfully submit that the route involved in this case unquestionably traverses "between points

within the same State * * * but through the air space over any place outside thereof" within the meaning of the Civil Aeronautics Act's definition of interstate air transportation.

* * * * *

In Appellant's Statement as to Jurisdiction, the contention is made that, if the direction issued by the Commission to United is to be viewed as an enforceable order under the California Public Utilities Code, the court below should not have enjoined the "order" in view of the Johnson Act, 28 U. S. C. A. 1342. The short answer to this contention is found in the express language of the Johnson Act itself, which provides that:

> "The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate making body of a State political subdivision, where:
>
> "(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal constitution; and,
>
> "(2) the order does not interfere with interstate commerce; and,
>
> "(3) the order has been made after reasonable notice and hearing; and,
>
> "(4) a plain, speedy and efficient remedy may be had in the courts of such State."

The Johnson Act is clearly inapplicable: (a) because jurisdiction is not based solely on diversity of citizenship, or repugnance of the "order" to the Federal Constitution, (b) because the "order" *does* interfere with interstate commerce, (c) because the "order" was not made after reasonable notice and hearing, and (d) because a plain, speedy and efficient remedy is not available in the courts of the State of California.

WHEREFORE, Appellees move that the within appeal be dismissed or that the judgment and decree of the District Court be affirmed.

Respectfully submitted,

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